

**TO THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA CONCERNING
THE FOLLOWING MATTER:**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

INFORMATION BUILDERS, INC.,

Opposer,

v.

OMNI DEVELOPMENT, INC.,

Applicant.

OPPOSITION NO. 91180960

Omni 52

Application for Issuance of Subpoena

1. ***Identity of Applicant.*** Through its undersigned attorney, Omni Development, Inc. ("Omni") seeks issuance of a subpoena pursuant to 35 U.S.C. § 24 and Federal Rule of Civil Procedure 45. Omni is the Applicant/Defendant in the above-captioned Opposition proceeding, which is currently pending before the Trademark Trial and Appeal Board ("TTAB") of the United States Patent and Trademark Office ("PTO").

2. ***The TTAB Opposition.*** Omni, which does business under the name Omni Group, develops and sells software that runs on various Apple Computer hardware including Macintosh computers and iPhones. Omni applied to the PTO to register the trademark OMNIFOCUS for its consumer task management software product. The PTO Examining Attorney determined that Omni was entitled to register OMNIFOCUS and published the mark in the *Official Gazette* for opposition. The Opposer/Plaintiff, Information Builders, Inc., learned of Omni's proposed registration and initiated this Opposition proceeding. Information Builders holds federal trademark registrations for the marks FOCUS and WEBFOCUS for computer software, and

contends that OMNIFOCUS is confusingly similar to those marks. The parties are currently obtaining testimony in conjunction with trial proceedings before the TTAB (see attached Stipulated Motion and Order granting motion).

3. ***Nature of the Deposition.*** Omni seeks to defend itself against Information Builders' opposition, in part, by demonstrating that numerous companies other than Information Builders use trademarks containing the term "focus" in connection with computer software. Such pervasive third-party use indicates that the term "focus" is not a strong identifier of source and therefore not entitled to a significant scope of protection. To present this evidence to the TTAB, Omni must depose witnesses and secure documents from companies and individuals that use the term "focus" as part of their marks in connection with software. Omni seeks to obtain, among other things, evidence of the nature of the products sold under "focus" marks; the length of time such products have been sold under these marks; and the revenue generated by and advertising expenditures associated with these "focus" marks. *See, e.g., Carefirst of Md. v. FirstHealth of the Carolinas Inc.*, 77 U.S.P.Q.2d 1492 (T.T.A.B. 2005) (describing evidence of sales and advertising developed through subpoenaed third-party witnesses).

4. ***Entitlement to Subpoena.*** The TTAB has no inherent power to secure the presence of witnesses at depositions, nor can it directly require individuals and entities to produce documents; however, Congress has directed the United States District Courts to issue subpoenas to secure testimony and documents in contested cases before the United States Patent and Trademark Office, including the TTAB:

The clerk of any United States court for the district wherein testimony is to be taken for use in any contested case in the Patent and Trademark Office, shall, upon the application of any party thereto, issue a subpoena for any witness residing or being within such district, commanding him to appear and testify before an officer in such district authorized to take depositions and affidavits,

at the time and place stated in the subpoena. The provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office.

35 U.S.C. § 24. Pursuant to this statutory provision and Federal Rules of Civil Procedure 30(b)(6) and 45, Omni seeks a subpoena commanding the person identified in Paragraph 5 to appear for testimonial deposition and to bring certain documents as identified in the attached Proposed Subpoena.

5. Description of the Party to Be Subpoenaed. Alex Hamilton has knowledge of Enfocue, Inc.'s sales and marketing of software under marks that include the term "Focus." Based upon its investigation, Omni believes that Alex Hamilton's residence is within this District at 515 East Mt. Pleasant Avenue, Philadelphia, PA 19119.

DATED this 23rd of March, 2009.

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